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IN THE

In the Supreme Court of the United States.

OCTOBER TERM, 1933

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, Petitioner,

v.

THE UNITED STATES OF AMERICA

REPLY BRIEF OF THE PETITIONER

Petitioner respectfully submits this brief in reply to the brief of the United States.

SUMMARY OF ARGUMENT

1.

The original order of the Interstate Commerce Commission construing Section 204(a) made March 4, 1920, did not represent the views of the Commission, but was in fact an order staying the operation of the section to all save "red ink" roads, until the subject might be given mature consideration.

2.

The classification of railroads on the basis of those having test period returns and those not having sufficient test period returns, or none at all, accords with the history of the legislation and the language of the act itself.

3.

The use of the word "deficit" to mean a difference or decrease in earnings during the control period as compared with the test period is supported by legislative history and by the use of the word "deficit" in the title of Section 204 and in Section 212(a) of the Act as well as in Section 204.

4.

The case of *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 190, and the case of *Crowell* v. *Benson*, 285 U. S. 22, relied upon by the Government are clearly distinguishable from the case at bar.

5.

In construing Section 204 in conjunction with Section 212(a) of the Act, it is clear that the certificates issued under either section by the Interstate Commerce Commission are final and conclusive, and the absence of the words "conclusive and final" as found in the Dent Act, *Work* v. *Rives*, 267 U. S. 175, does not militate against the conclusiveness of the certificates herein, for that an express declaration in the Act to the effect that the certificate is final is not more controlling than the express declaration of this Court in *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, to the effect that certificates issued under Section 212(a) are "final and conclusive."

The equities of the petitioner set forth in the answer cannot be disposed of by the quotation from the case of *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 212, quoted by the Government (Resp. Br. 38) for the reason that no equities on behalf of the railroad company were either pleaded or shown according to the records in that case. The record expressly states that no inequity would be visited upon the railroad by reason of the receipt of the moneys from the Post Office Department, and the Court in that opinion recognized that moneys illegally paid may be recovered back "where no peculiar circumstances appear to make such recovery inequitable and unjust." If the respondent is required to repay the money to the Government in this case, it will suffer substantial injury. The Government does not offer to place the petitioner in *statu quo*. Seeking equity, the Government must do equity.

ARGUMENT

1. The Original Order on Section 204(a) By the Interstate Commerce Commission, March 4, 1920, Did Not Represent the Views of the Commission.

The so-called first ruling (Resp. Br. 5) did not in fact reflect the views of the Interstate Commerce Commission as to the construction of Section 204(a), but simply stayed the operation of the Section to all save "red ink" roads, until the subject could have mature consideration.

> "This announcement was made out of abundant caution at a time when we had had no opportunity to give to the section, especially to paragraph (a) thereof, the critical and mature consideration essential to its correct interpretation."

Construction of the word "deficit", 66 I. C. C. 765, 766.

2. Classification of Railroads on the Basis of Test Period Returns Accords With the History of the Legislation.

The Government contends (Resp. Br. 24) that Section 204 should be construed as classifying railroads into two classes:

1. Railroads having earnings in excess of expenses.
2. Railroads having expenses in excess of earnings.

This does not accord with the history of the legislation, or the language of the section.

The Federal control act classified railroads into two classes: :

1. Those having test periods, and,
2. Those having no test periods, or insufficient test periods.

This latter classification is adopted in the Transportation Act. It is a reasonable basis for classification.

It is a matter of common knowledge that of the hundreds of Shortline roads coming within the terms of the Transportation Act, there were but few of such recent construction as to not have at least one year's operation in the test period, and while as to some of these few roads discrimination might result, it could not be avoided as they had not sufficient test period operations by which the loss, if any, they suffered could be determined.

3. As To the Legislative History and the Word "Deficit"

The Government contends (Resp. Br. 26) that the "petitioner relies principally upon speeches and discussions by

individual members of Congress on the floor of the Senate and the House" and that such "speeches and discussions" under the authority of *Omaha Street Railway* v. *Interstate Commerce Commission,* 230 U. S. 324, 333, may not be considered by this Court in determining the legislative purpose.

In that case the question was whether or not a street railroad was included within the definition of the word "railroad" as used in the Act. Reference was had to the Congressional Record wherein the Chairman of the Senate Committee during discussion had stated that a "street railway" was not intended to be included. The Court concurred in the view of the Commerce Court that the meaning of the statute could not be determined from statements made in debate. On reading the case, however, we find that the Court held that the word "railroad" did not in fact include a "street railway" so that the language is *obiter dictum.*

The Government then says (Resp.. Br. 26-27) "the authoritative history of a statute consists of the committee report and statements by those actually in charge of the bill", citing *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269. The vital references in petitioner's Brief and Appendix herein are within this rule, as reiterated and enlarged upon in the case of *United States* v. *Great Northern Railway Company,* 287 U. S. 144, 154 (Pet. Br. 9-10).

Reference to the legislative history discloses that Senator Pomerene was the ranking majority member of the Committee on Interstate Commerce of the Senate and one of the "managers on the part of the Senate" of this bill when it was pending before that body, and further that he was a member of the Conference Committee which reported the bill as finally passed. Therefore, recourse can be had to the statements made by Senator Pomerene as found in the Congressional Record, disclosing his use of the word

"deficit", namely that it meant the difference between the standard or test period earnings and the earnings during federal control.

Furthermore, in connection with the remarks of Senator Pomerene as disclosed by this record (Pet. Br. 26-28) the Senator presented to the Senate a tabulated statement furnished to him by Hon. George B. McGinty, then Secretary of the Interstate Commerce Commission, showing that the Interstate Commerce Commission, in tabulating and comparing the standard return guaranteed (the test period earnings) and the net railway operating income of all roads for the year 1919, designated such difference a "surplus" or "deficit", as the case might be. So that, not only Senator Pomerene, as one of the managers of the bill and as a member of the committee to which it was referred, used the word "deficit" exactly as the petitioner asserts the Congress intended, but also the Interstate Commerce Commission furnished to the Senate a tabulated statement containing information for use in connection with the passage of this bill, which tabulated statement shows that the Interstate Commerce Commission and its accounting department, which necessarily made up this tabulated statement, used the word "deficit" to denote the difference between the test period return and the control period return.

Now let us look to the Senate Report No. 304, Part 1, submitted by Senator Cummins. (App. to Pet. Br. 85-88.) It appears from this report that the committee incorporated therein and made a part thereof a communication addressed to Senator Cummins from the Director, Division of Finance, United States Railroad Administration, wherein it is stated, among other things:

> "1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended December 31, 1919, $551,777,459."

In the minority report (Report No. 304, Part 2), (App. to Pet. Br. 87), by Senator LaFollette, it is stated:

> "There is no longer a loss chargeable against the Government in operating the railroads as we slowly approach more settled business conditions. The monthly deficit, which has been the object of so much adverse criticism against Government operation, has wholly disappeared, and in its place appears a net monthly profit of millions of dollars."

Again we find that both the majority report and the minority report of the Committee use the word "deficit" as meaning exactly what the petitioner herein contends it should be construed to mean; and that the Division of Finance of the United States Railroad Administration in its communication addressed to Senator Cummins, contained a statement to the effect that the "deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income" amounted to more than a half million dollars.

The communication from the Director and the communication from the Interstate Commerce Commission are a part of the legislative history to which recourse is had by this Court.

A letter from President Hoover to the Chairman of the Finance Committee of the Senate was referred to by this Court as a part of the legislative history in *Norwegian Nitrogen Prod. Co.* v. *United States,* decided February 6, 1933, 53 Sup. Ct. Rep. 350, 355.

In addition to the foregoing, petitioner's brief and appendix disclose that the history of the period preceding and accompanying the passage of this Act and the known mischief to be remedied, as well as the general trend of debate in both Houses, compel the conclusion that Congress meant to deal with the shortline railroads on the same basis, as far as might be, as it dealt with the trunk line roads.

"The underlying purpose of Congress was the same in both cases." *Continental Tie and Lumber Co.* v. *United States*, 286 U. S. 290, 294.

The rule was stated and applied by this Court in *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 435 (cited in Petitioner's Brief at page 25), as follows:

> "A consideration of the history of the period immediately preceeding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. In passing Section 1, Congress could exercise only the power conferred by the commerce clause; but in passing Section 3, it had unlimited power, except as restricted by other provisions of the Constitution. We are, therefore, free to interpret Section 3 dissociated from Section 1 as though it were a separate and independent act, and thus viewed, there is no rule of statutory construction which prevents our giving to the word 'trade' its full meaning, or the more extended of two meanings, whichever will best manifest the legislative purpose. We perceive no reason for holding that Congress used the phrase 'restraint of trade' in Section 3 in a narrow sense."

Notwithstanding this legislative history showing the use of the word "deficit" to denote the difference between test period returns and control period earnings by the Managers of the Bill, the Committee, the Interstate Commerce Commission, and the United States Railroad Administration, we find in the Government's Brief (p. 15) the following:

> "'Deficit' is essentially an accounting term which is *universally* accepted to mean that the earnings from a business during a stated period are less than the costs incurred." (Italics ours.)

If further proof be necessary to disprove this statement, we need only refer to Section 212(a) (App. Pet. Br. 32) of the Act itself. This section provides for the issuance of certificates under Section 204 or Section 209 by the Commission in advance of a final determination of the amount due a railroad under either section.

To illustrate, if a carrier, which connected with or competed for traffic with a controlled road, operated its own road during any portion of the Federal control period, and likewise operated its road during the test period, which carrier claimed earnings of $250,000 in the test period and a loss of $50,000 in the control period, and had presented its claim to the Commission for $300,000, and if the Commission was "not at the time able finally to determine the whole amount due under such section", the commission might "make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates until the whole amount due has been certified." (Section 212(a).) Assuming that the Commission "definitely ascertained" that $150,000 would be due this carrier, it might issue a partial certificate therefor, and it might later, upon finally determining the whole amount due, issue a final certificate for the balance.

Section 212(a) further provides "warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for payment in respect to *reimbursement of a carrier for a deficit during the period of Federal control*, out of the appropriation made by Section 204;" (Italics ours.) (Section 212 (a).)

In this section the Congress used the phrase "deficit during the period of Federal control" to mean the amount which is ultimately paid to the carrier, whether it be a "test period" road or not.

In the illustration given above, if the railroad which presented its claim was finally paid under Section 212(a) by

one or more partial certificates and a final certificate, it would be paid its entire "deficit", namely the difference between its test period earnings and its control period earnings, and "deficit" as used therein necessarily means such difference and not a "red ink" balance, except where it might apply to roads without sufficient or no test periods.

Compare the title of Section 204 with the phrase used in Section 212(a) and it compels the conclusion that the word "deficit" means the same in both.

> Title of section 204. (App. Pet. Br. 22.)
> "Reimbursement of Deficits During Federal Control."
> Phrase in Section 212(a).
> "Reimbursement of a carrier for a deficit during the period of Federal control."

As to "test period" railroads, in both cases "deficit" means, not a "red ink" figure, but the difference between the "test period" earnings and the "control period" earnings.

Therefore, instead of the word "deficit" being *universally* accepted to mean excess of expenses over revenue as contended by the Government, the position of the petitioner that the word "deficit" denotes the difference between test period returns and control period earnings is supported by such use of the word—

1. By the managers of the bill.
2. By the Majority Committee report.
3. By the Minority Committee report
4. By the Interstate Commerce Commission.
5. By the United States Railroad Administration.
6. By the Congress in Section 212(a) and in the title of Section 204.

4. Wisconsin Central Railroad Company v. United States, 164 U. S. 190, and Crowell v. Benson, 285 U. S. 22, Distinguished. (Resp. Br. 31-34)

The Government, to sustain its right to disregard the decision of the Commission, holding that the petitioner came within subdivision (a) of Section 204, states that "The question whether a particular carrier was within the purview of the section is purely judicial, for that question is fundamental or 'jurisdictional'." (Resp. Br. 33.) The Government concedes that the Interstate Commerce Commission was authorized under the Act to make a judicial decision to determine what carriers came within the Act. The Commission, therefore, had jurisdiction to consider the question. Having jurisdiction to consider the question, the conclusions reached by the Commission, whether right or wrong, do not affect its jurisdiction.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * *. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction."
>
> General Investment Company *v.* N. Y. C. R. R. 271 U. S. 228, 230.

In the *Wisconsin Central Railroad* case, the railroad company was engaged among other things in the transportation of the United States mails. Under the then existing law, if it were a land grant railroad it would receive but 80 per cent of the standard rates prescribed by Congress. The railroad contended it was not a land grant railroad within the meaning of the Statute. The Postmaster General, by a mistake, agreed that it was not a land grant road; and it was paid, over a period of time, full statutory rates. Later the Postmaster General, conceiving it to be a land

grant road, and entitled only to the lower rate, withheld from its later accounts the excess payments theretofore made, and the suit followed. The railroad was held to be a land grant road. It also contended that:

> "it was not competent for the Postmaster General to withhold the moneys thus paid without authority of law, as the previous directions to make the payments were decisions binding on the department; because the payments were voluntarily made on due consideration and deliberation and the accounts settled * * *."
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 205.

This Court answered:

> "The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, *does not act judicially*, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice." (Italics ours.)
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 205.

It is also pointed out by the Court that Section 4057 of the Revised Statutes requires the Postmaster General to cause suit to be brought to recover excess payments made from the funds of the Post Office Department under fraudulent representations or by mistake. *Wisconsin Central Railroad Company v. United States*, 164 U. S. 190, 210, 211.

That case is, therefore, distinguished from the case at bar, on at least two grounds:

(1) The Interstate Commerce Commission acts judicially; the Postmaster General does not;

(2) The Statute directed that action be brought by the Postmaster General; the Transportation Act makes no provision for the maintenance of any action by or on behalf of the Government either directly, by appeal, review, or otherwise.

The Government next relied upon *Crowell* v. *Benson*, 285 U. S. 22 (Act of March 4, 1927, c. 509; 44 Stat. 1424 U. S. C., Title 33, Sec. 901-950). This law provided for compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" and it applied *only when the relation of master* and servant existed. It is pointed out in the decision that before Congress had power to legislate on the subject, these two things must concur, namely, the relation of master and servant, and employment upon the navigable waters of the United States. Congress had no power to pass any general compensation law.

That case is clearly distinguishable from the case at bar on at least two grounds:

1. Section 21 of that Act provides for a review of the compensation orders made by the Deputy Commissioner who administers the Act, and that action was brought pursuant to said section authorizing such review.

2. It was not a subject over which the Congress had general jurisdiction. The constitutional rights of citizens were invaded unless the relation of master and servant existed and unless the injury occurred upon the navigable waters of the United States. The citizen, therefore, had a right to have those questions of his constitutional rights determined by the Courts and not by Congress, or its agency.

As to the first ground, petitioner has pointed out in its

brief that no right of appeal or review of the action of the Interstate Commerce Commission as a special tribunal in the administration of the Transportation Act is provided, whereas in the case of *Crowell* v. *Benson*, Section 21 of the Act specifically provided for a review.

As to the second ground, namely, the constitutional question involved, it was without the power of Congress to legislate upon the subject, except in a limited way, and the citizen had a right to a judicial determination of the question as to whether or not Congress exceeded its power.

The Court points out the difference between that case and cases such as the case at bar in the following language:

> "In relation to the Federal Government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress."
>
> Crowell *v.* Benson, 285 U. S. 22, 57.

As examples, the Court referred to the Land Office Department; Post Office Department; Bureau of Internal Revenue; and the Labor Department's activities as to the admission and deportation of aliens.

The Government recognizes this in its Brief (p. 34) and states:

> "The case at bar does not fall within the class of cases which the opinion in that case distinguished (pp. 57-58) from the decision therein, for in this case the Commission was not exercising its power as an agency of Congress to regulate commerce."

We grant that the Interstate Commerce Commission was

not exercising its power as an agency of Congress to regulate commerce, but we submit that it was exercising its power as an agency of the Congress in the administration of Title II of the Transportation Act, and particularly of Section 204 thereof.

No one can question that Congress had full power to make such adjustments with the railroads of the country as in its judgment seemed wise; in fact, Congress was not required to establish an agency to investigate and determine what railroads were entitled to reimbursement, and the amounts thereof, but might have made these determinations for itself and made direct appropriations of specific sums of money for each and every railroad in the United States which it thought entitled thereto. No constitutional limitations could be urged against the powers of Congress in that regard, and hence there was no necessity for providing for a judicial review of any decision made by any agency which it might designate to carry out its purposes.

5. Construing Section 204 In Conjunction With Section 212(a), It Is Immaterial That the Words "Conclusive and Final" Do Not Appear In This Act As In the Dent Act. (Work v. Rives, 267 U. S. 175).

In the Government's brief (p. 34) is the following statement:

> "Section 204 is silent with respect to finality or Court review of the Commission's action. The decision of the Circuit Court of Appeals, therefore, is not in conflict with this Court's decision in *Work* v. *Rives*, 267 U. S. 175, or other decisions construing the Dent Act prior to amendment, because that Act then expressly declared that the decision of the Secretary of the Interior was 'conclusive and final'."

It is true that Section 204 is silent as to finality. However, it cannot make any difference whether the Act expressly declares a decision to be final, or whether this Court expressly holds a decision to be final. Certificates issued under Sections 204 and 209 by virtue of the provisions of Section 212(a) of the Transportation Act are final, although there is no express declaration in Section 212(a) that such certifications are "conclusive and final." *United States* v. *Great Northern Ry. Co.* 287 U. S. 144.

Section 212(a) provides among other things:

> "SECTION 212(a). In making certifications under Section 204 or Section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier * * * may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by Section 204; * * *." (App. to Pet. Br. 32.)

Certificates issued pursuant to this section, whether in partial payment or in final payment, are "conclusive and final" under the ruling of this Court in the case of *United States* v. *Great Northern Ry. Co.* 287 U. S. 144.

A "partial" certificate issued to a shortline carrier under Section 212(a), payable "out of the appropriation made by Section 204", is final; therefore, a "final" certificate issued under Section 204 itself must be final.

6. As to the Equities of the Petitioner

The Government, in disposing of the equities of the petitioner, relies solely upon the case of *Wisconsin Central*

Railroad v. *United States*, 164 U. S. 190, 212, quoting as follows: "* * * parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." (Resp. Br. 38.)

The complete sentence of which this quotation is a part reads as follows: "We concur in these views and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex acquo et bono* to refund them." In other words, the Court did not rule in the *Wisconsin Central* case that "all" moneys illegally paid by a public officer might be recovered, but held that in that particular case, there was nothing on the record which justified taking the case out of the general principle just stated. The Court recognized that there were exceptions to this rule, and stated:

> "It is unnecessary to go into a discussion of the exceptions which may exist between private parties to the rule that moneys paid through mistake of law could not be recovered back."
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 211.

This contention was disposed of by this Court on the authority of *Duvall* v. *United States*, 25 C. Cl. 46, wherein that Court said, referring to this principle:

> "That money paid in violation of law upon balances certified by the accounting officers *generally* may be recovered back by counter claim or otherwise; *where no peculiar circumstances appear to make such recovery inequitable and unjust.*" (Italics ours.)
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 211.

The Court of Claims found that:

> "The only effect which the misrepresentation of the Post Office Department has caused is that the claimant.

by reason of over payment, has had in its possession money which it was not entitled to have, and that it has had it without the payment of interest."

Wisconsin Central Railroad Company *v.* United States, 27 C. Cl. 440, 469.

Therefore, it was expressly decided that there were no circumstances in connection with the receipt by the railroad company of this money which would invoke the rule, which is thus stated:

"The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

Keener on Quasi-Contracts, page 67.

The loss, injustice and inequity which will be visited upon the petitioner if the Government prevails in this case are clearly set forth in the affirmative defense of the petitioner in its amended answer (R. 50-54), wherein it appears:

1. That the petitioner filed its claim only after the Interstate Commerce Commission had ruled (66 I. C. C. 765, Finance Docket 1600) that petitioner came within the Act, and that for the preparation, filing and presentation of its claims it expended in excess of $30,000.
2. That after receipt of the money it paid out $375,000 to its stockholders as dividends.
3. That its taxes were increased by reason of the receipt of the money.
4. That if compelled to make repayment, it will be insolvent.

These allegations are all admitted.

"This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement con-

tract that has already been performed, and that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit, the Government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

D'Olier Engineering Co. *v.* United States, 244 Fed. 90, 94.

In this kind of an action, where it is shown that injury will result to an innocent and blameless defendant, the plaintiff must place the defendant in *statu quo*, as a condition precedent to its right to recover.

If this action were between two citizens of this Government, no doubt could be entertained but that recovery would be denied. The Government should not be permitted to visit loss, injustice and inequity upon its citizens in any case where the citizen would be protected against his fellow citizens under like circumstances. There is not one law for the Government and another for the citizen.

Like the citizen, when the Government seeks equity, it should do equity.

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